IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 20, 2008

STATE OF TENNESSEE v. THOMAS EDWARD NICHOLSON

Direct Appeal from the Criminal Court for Davidson County
No. 2005-B-1060 Steve Dozier, Judge

No. M2007-01274-CCA-R3-CD - Filed July 2, 2008

A Davidson County Criminal Court jury convicted the appellant, Thomas Edward Nicholson, of theft of property valued one thousand dollars or more but less than ten thousand dollars, and the trial court sentenced him as a career offender to twelve years in confinement. On appeal, the appellant contends that (1) the trial court erred by ruling that his wife opened the door to cross-examination about his having prior felony theft-related convictions and (2) the evidence is insufficient to support the conviction. Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Emma Tennent and Aimee Solway (on appeal) and Mary Kathryn Harcombe and Amy D. Harwell (at trial), Nashville, Tennessee, for the appellant, Thomas Edward Nicholson.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Rachel M. Sobrero and Lori Hulin, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At trial, Dr. Sharon Stein-Schach, the victim, testified that in 2004, she lived at 6371 Chickering Circle with her husband. On Christmas morning, the victim and her husband were packing for a trip to Atlanta, and she began looking for a gold necklace but could not find it in the drawer where she usually kept it. When the victim returned home from Atlanta two days later, she looked for the necklace again and discovered that four other pieces of jewelry were also missing. The four pieces were her engagement ring, a gold wedding band, a gold bracelet, and an emerald

ring. She described the engagement ring as having "four diamonds in a row, set in U-shaped white gold, each stone." She said the ring was insured for $1,872 and that she usually kept all of the missing jewelry in a locked drawer in her bedroom dresser. The lock was a "simple lock" and came with a standard key that the victim kept under some clothing in a different drawer in the dresser. She thought she last wore the jewelry in October 2004. The victim stated that she had used Charlene's Cleaning Service, owned by the appellant's wife, to clean her house for the past twelve years. In the middle of October 2004, the victim knew the appellant had been in her house because he left the victim and her husband a signed note in their kitchen, offering to seal their deck or driveway. After the victim discovered that her engagement ring was missing, she did not see it again until she picked it up from a pawn shop on Clarksville Highway. She said she never gave anyone permission to take the ring from her home and pawn it.

On cross-examination, the victim testified that she contacted the police on December 28, 2004. Nothing other than the jewelry was missing, and the engagement ring was the only item she recovered. She acknowledged that the jewelry could have been taken from her house anytime between the end of October and the end of December 2004. The victim was at work the day the appellant left the note in her kitchen, and she assumed he came to her house with Charlene's Cleaning Service. The company had a key to the victim's home and usually cleaned every room. The victim left her home's burglar alarm turned off on Wednesdays because that was the day the cleaning service usually cleaned. The victim had never had any problems with the cleaning service before this incident.

Dwight Nash testified that he owned Quick Cash Pawn and Jewelry on Clarksville Highway. He stated that when he accepted property from a customer for pawn, he had the customer sign an affidavit swearing under oath that the customer owned the property. Nash also obtained the customer's driver's license number, height, weight, and age and a complete description of the property. Each day, Nash e-mailed information about all pawned items to the Metropolitan Nashville Police Department (Metro Police). At 4:23 p.m. on December 13, 2004, the appellant came into the store and pawned a four-diamond engagement ring for one hundred dollars. Nash said the signature on the affidavit the appellant signed read, "Thomas Nicholson."

Metro Police Detective Richard Chmielewski testified that in late 2004, he assisted another detective with some jewelry theft cases. As part of their investigation, the detectives met with the victim and her husband at the Quick Cash Pawn and Jewelry store. The victim drew a picture of her missing engagement ring, and the picture matched the ring at the pawn shop "precisely." Detective Chmielewski told the victim to page him the next time the appellant came to her home. On January 5, 2005, the victim paged the lead detective in the case, and he and Detective Chmielewski went to the victim's house. The appellant was at the home with Charlene's Cleaning Service, and the officers questioned and arrested him. On cross-examination, Detective Chmielewski acknowledged that according to the victim's police report, her jewelry could have been taken anytime between October 31 and December 29, 2004, and that the victim said she last saw her jewelry on October 31. He stated that he did not question Charlene Nicholson, the appellant's wife and owner of the cleaning service, or her other employees. On redirect examination, Detective Chmielewski testified

that he did not question the other employees because they were "standardized employees" and because the theft did not occur until the appellant began working for the company.

Dr. Stephen Schach, the victim's husband, testified that he contacted the police and the insurance company when he learned his wife's jewelry was missing. On Wednesday, January 5, 2005, Dr. Schach stayed home because the cleaning service was supposed to clean the house. When the cleaning crew arrived, Dr. Schach telephoned the police. The police came to the home and arrested the appellant. The appellant told the police that he had found the ring in the car. The appellant's wife asked him, "Why did you do it?" and the appellant answered, "To buy you a birthday present."

Charlene Nicholson, the appellant's wife, testified for the thirty-seven-year-old appellant that she had owned Charlene's Cleaning Service for almost twenty years. Mrs. Nicholson stated that when her employees cleaned a home, they left their personal items such as watches and rings in her van and sometimes forgot to retrieve them. In the fall of 2004, Charlene's Cleaning Service cleaned the victim's home, including the three upstairs bedrooms, every Wednesday. Although the appellant had his own business pressure washing decks and driveways and did not work for his wife's company, he drove his wife's cleaning van for her for one week in the middle of October because she had fallen and hurt her back. Mrs. Nicholson said the appellant went into the victim's home that Wednesday to leave a note about the victim's deck "and that's all." That day, the appellant's son cleaned the home's upstairs areas, another person cleaned the kitchen, and a third person vacuumed. The only other time the appellant was in the victim's home was the day the police arrested him. After the police arrested the appellant, Mrs. Nicholson asked him, "Why, Tommy, why?" She stated that she was not asking the appellant why he stole the ring but was asking him why he did not give it to her when he found it. She said the appellant did not steal. In November and December 2004, Marietta Viera worked for Mrs. Nicholson and cleaned upstairs rooms. At the end of November or the first of December 2004, Mrs. Nicholson fired Viera for stealing medication from Mrs. Nicholson's sister's home.

On cross-examination, Mrs. Nicholson testified that she married the appellant on October 15, 2004, and had known him about three and one-half months at the time of their wedding. She acknowledged that she loved the appellant and that she had never had any previous problems working for the victim. She said she would not hire anyone she thought was a thief. She acknowledged that she was aware the appellant had multiple prior theft-related convictions but said the appellant was no longer a thief. She said she was not present at the victim's home on the day the appellant left the note in the victim's kitchen and that she was born on December 9, 1937.

Jamie Williams, Charlene Nicholson's son and the appellant's stepson, testified that in the fall of 2004, he was working "off and on" for his mother's cleaning service and saw the appellant clean out the cleaning van a few times. Williams stated that he had cleaned the victim's master bedroom previously but that he had not known jewelry was in her dresser. Williams saw the appellant help clean the victim's home only one time, the day the police arrested him for stealing the victim's engagement ring. A few months before the appellant's arrest, the appellant dropped off a

flyer at the victim's home advertising pressure washing. Williams did not see the appellant upstairs that day or any other day. Williams stated that the cleaning service's female employees sometimes left personal items such as jewelry in his mother's van.

The victim testified on rebuttal for the State that the upstairs of her home was not an open floor plan. She said the upstairs area had several places where a person could be working and would not be able to see the other rooms. The jury convicted the appellant of theft of property valued one thousand dollars or more but less than ten thousand dollars.

II. Analysis

A. Cross-examination of Charlene Nicholson

The appellant contends that the trial court erred by concluding that his wife opened the door to cross-examination regarding his having prior felony theft-related convictions when she testified on direct examination that he did not steal. The State argues that the trial court properly ruled Nicholson's statement put the appellant's character directly at issue and, therefore, that she opened the door to cross-examination about his having prior convictions. We agree that the witness opened the door to the appellant's character and that the trial court did not err by allowing the State to ask her if she was aware of the appellant's prior thefts.

Prior to trial, the trial court ruled that the State's witnesses could not mention anything about the appellant's prior convictions. During Charlene Nicholson's direct testimony, she testified that after the police arrested the appellant, she asked him, "Why, Tommy, why?" The following exchange then occurred:

> Q So, when you were saying, "Why," did you mean, "Why did you steal it?"?
>
> A He doesn't steal.
>
> Q Okay.
>
> A That was –
>
> Q Well –
>
> A He doesn't steal.
>
> Q So, you didn't mean, why did he steal?
>
> A No.

Q Okay. You just meant why did he pawn it.

A Right.

After the defense finished questioning the witness, the State asked to approach the bench, and the trial court sent the jury out of the courtroom. The following exchange then occurred:

> THE COURT: What do I do with what the State's now wanting to ask Ms. Nicholson about?
>
> [Defense Counsel]: You're assuming I know, and I assume I know; I'd like to know –
>
> THE COURT: You don't?
>
> [Defense Counsel]: Pardon me?
>
> THE COURT: This lady's just testified that, "He doesn't steal," which places his character at issue.
>
> [Defense Counsel]: It does, Your Honor.

The trial court then asked defense counsel if she agreed that Mrs. Nicholson's testimony opened the door to the appellant's criminal history. Defense counsel stated that she believed the State could ask the witness if she had ever known the appellant to steal anything during the three years she had known him but that the witness had not opened the door to cross-examination about the appellant's prior criminal record. The trial court disagreed, noting that the defense had "casts dispersions" on Mrs. Nicholson's other employees, and concluded that the witness had opened the door to the appellant's character by stating he was not a thief. However, the trial court ruled that in order to limit the prejudicial effect of testimony about the appellant's criminal history, the State could only ask the witness if she was aware that the appellant had "multiple felony theft-related convictions."

When the State cross-examined Mrs. Nicholson, she acknowledged that she was aware of his multiple felony theft-related convictions but stated, "He's not a thief now." After the State finished questioning her, the trial court instructed the jury as follows:

> You've heard testimony from Ms. Nicholson, and now in cross-examination . . . testimony . . . being allowed to be asked . . . about her knowledge about Mr. Nicholson's past.
>
> You can consider that testimony, if at all -- and I say, "if at all," because it's up to you as to what weight you give any witness' testimony -- but you can use that testimony that she's been asked

about, in terms of Mr. Nicholson's past only as it supplies meaning to Ms. Nicholson's testimony and credibility as a witness, in terms of her opinion that she's offered here today about her husband.

You cannot consider [it] for any other purpose, including the purpose as to whether Mr. Nicholson is guilty of this particular offense; you cannot do that.

You can use it, if at all, in determining your evaluation of Ms. Nicholson's opinion that she's offered to you about her husband.

Under Tennessee Rule of Evidence 404(a), evidence of a person's character generally is not admissible to prove the person acted in accordance with that character at a particular time. Similarly, "[e]vidence of other crimes, wrongs, or acts [generally] is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). However, if a defense witness "opens the door" to character evidence, the State may cross-examine the witness about specific instances of conduct if (1) upon request, the trial court holds a hearing outside the jury's presence, (2) the court determines that a reasonable factual basis exists for the State's inquiry, and (3) the court determines that the probative value of the specific instance of conduct outweighs its prejudicial effect on substantive issues. Tenn. R. Evid. 405(a). The trial court must also instruct the jury that it may consider the testimony only as it affects the witness' credibility. See Tenn. R. Evid. 405(a), Advisory Commission Comments. The propriety, scope, manner, and control of the cross-examination of witnesses rests within the discretion of the trial court. State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995).

Initially, we note that the State never stated on the record that it believed Mrs. Nicholson had opened the door to cross-examination about the appellant's prior criminal record. Instead, the State asked to approach the bench, and the trial court announced that the witness had opened the door. Although the appellant does not raise the trial court's sua sponte announcement as an issue, we must remind the trial court that "trial judges should always use restraint and not interject themselves into a role in a trial which may be perceived as that of an advocate rather than an impartial arbiter." State v. Riels, 216 S.W.3d 737, 747 (Tenn. 2007). That said, we do not believe the trial court's action in this case constitutes reversible error. Compare id. (concluding that the trial court's sua sponte announcement that the capital-case defendant had opened the door to cross-examination about the circumstances of the crimes had resulted in the trial court's violating the defendant's constitutional right against self-incrimination).

The appellant contends that Mrs. Nicholson did not open the door to cross-examination about his prior criminal record because her statement was unsolicited by the defense and was unresponsive to defense counsel's question. He also argues that, in any event, cross-examining her about his prior record had little impeachment value because jurors are naturally skeptical of family members who testify for defendants and because Mrs. Nicholson's credibility was already poor in light of the fact that she had known the appellant for only three months when she married him. Finally, he argues

that the trial court's instruction to the jury "was so garbled and contradictory as to render it incomprehensible."

First, we agree with the trial court that once Mrs. Nicholson stated that the appellant did not steal, she put his character as a thief at issue even if the defense did not intend for her to do so. As for the appellant's claim that Mrs. Nicholson's being related to the appellant automatically resulted in her having little credibility, we disagree and note that other factors reflected favorably on her credibility. For example, Mrs. Nicholson had owned her business for twenty years, she had cleaned the victim's home for twelve years without incident, and the victim demonstrated trust in Mrs. Nicholson by giving Mrs. Nicholson a key to her home. Regardless, the trial court was in the unique position to observe the witness' demeanor and conduct and make a determination about her credibility. See State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). It is within the trial court's discretion to assess the probative value and danger of unfair prejudice regarding the evidence. State v. Burlison, 868 S.W.2d 713, 720-21 (Tenn. Crim. App. 1993). The trial court followed the procedural safeguards of Tennessee Rule of Evidence 405, and concluded that the probative value of the evidence relative to the witness's credibility outweighed any danger of unfair prejudice to the appellant. We cannot conclude that the trial court abused its discretion As for the trial court's jury instruction, it informed the jurors that they could consider Mrs. Nicholson's testimony about the appellant's prior convictions only as it affected her credibility and not in their determination of his guilt. This was a correct statement of the law. Therefore, the appellant is not entitled to relief.

B. Sufficiency of the Evidence

The appellant claims that the evidence is insufficient to support the conviction because although he gained possession of the ring and admitted pawning it, no one witnessed him taking the ring. He argues that his failing to hide his identity at the pawn shop and leaving a note at the victim's home "strains credulity to believe that [he] would twice deliberately place evidence of his presence at the scene of the crime." The State contends that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal

with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

It is well-established that a guilty verdict can be based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 292-93 (Tenn. Crim. App. 1999). Moreover, while a guilty verdict may result from purely circumstantial evidence, in order to sustain the conviction the facts and circumstances of the offense "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the [appellant]." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). Theft, occurs when a person "with intent to deprive the owner of property . . . knowingly obtains or exercised control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103.

Taken in the light most favorable to the State, the evidence shows that in the middle of October 2004, the appellant entered the victim's home while his wife's employees were cleaning. Two months later, the victim, who had used the cleaning service for twelve years without incident, discovered that five pieces of jewelry were missing from a locked drawer in her bedroom. Although the police report indicated the jewelry disappeared between the end of October and the end of December, the victim testified that she last wore the jewelry sometime in October. On December 13, 2004, the appellant pawned the victim's diamond engagement ring at the Quick Cash Pawn and Jewelry store where it was recovered by police. The appellant claimed he found the ring in his wife's cleaning van and pawned it to buy her a birthday present. However, the appellant never attempted to find the ring's rightful owner and pawned the ring on December 13, four days after his wife's birthday. "Proof of possession of recently stolen goods, if not satisfactorily explained, gives rise to the inference that the possessor has stolen them." State v. Gautney, 607 S.W.2d 907, 909 (Tenn. Crim. App. 1980). We conclude that the evidence is sufficient to support the conviction.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE